No. 10,665

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

A. T. MARTIN and ALICE M. MARTIN,
Appellants,

vs.

CHARLOTTE L. SHEELY, JOHN H. SHEELY, JOE A. SHEELY and ROSS L. SHEELY, co-partners,
Appellees.

Upon Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLANTS.

THOMAS M. DONOHOE,
JOHN E. MANDERS,
Anchorage, Alaska,
Attorneys for Appellants.

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STATEMENT OF THE CASE.

Prior to June 26, 1941 appellants owned and operated a dairy and milk distribution business at and around Anchorage, Alaska and on that date entered into an agreement for the sale of the personal property used in said business and the leasing of the real estate upon which it was situated, together with a grazing permit upon certain other lands, with appellees Charlotte L. Sheely, John H. Scheely and Joe A. Sheely. On the same date appellee Ross L. Sheely guaranteed in writing the performance of these contracts.

This litigation arises out of plaintiffs' and appellees' contention that certain livestock involved in the contract of sale was infected with Bang's disease at the time of the sale and that this was known to appellants and not to appellees. Appellants, on the other hand, contend that the property was purchased by said appellees specifically without any warranties whatsoever as to the condition of the livestock and after inspection by the appellees.

Appellees' complaint, filed May 13, 1942, alleges briefly:

That as a result of certain oral negotiations plaintiffs and appellees Charlotte L. Sheely, John H. Sheely, Joe A. Sheely and the defendants-appellants made and executed a conditional sales agreement, a lease and a grazing permit (R. 2-3) copies of which are set out in full as exhibits, and that each of these instruments was a part of the whole transaction. Under the conditional sales agreement appellants agreed to sell and said appellees agreed to purchase

> "The whole of that dairy and milk distribution business now being conducted by the sellers under the trade name and style of Step And Half Ranch at and around Anchorage, Alaska, save and except the accounts receivable of the sellers but including the livestock, furniture and fixtures, farming implements and tools and motive equipment that are set forth and particularly described in the hereto attached inventory marked exhibit 'A' which is by reference incorporated in and made a part of this description; and also including the good will of the sellers in and to said dairy and milk distribution business"

for the sum of $28,294.00 payable $9800.00 in cash and the balance at the rate of $308.22 on the 10th day of each month commencing on August 10, 1941, together with interest at six percentum from the 1st day of July, 1941 until paid. (R. 10-11.) Paragraph Sixth of said conditional sales agreement reads as follows:

> "Sixth. It is understood and expressly agreed that the buyers have inspected the property covered by this agreement and are familiar with the condition thereof and that the same is sold to the buyers without any warranties or representations of any kind or character whatsoever on the part of the sellers, save and except that the sellers warrant and agree that they are the lawful owners thereof and have full right, power and authority to sell and dispose of the same and that there are no existing liens or encumbrances against said property or any part or portion thereof." (R. 13.)

Exhibit "A" attached to this conditional sales agreement embraces 99 classifications of property of which the first two are "56-Cows, 1-Bull". (R. 17-20.) In the lease appellants leased to said appellees certain real estate situated in Anchorage Precinct, Territory of Alaska, for a term of ten years commencing with July 1, 1941 at the monthly rental of $200.00 per month in advance. (R. 21-26.) By the grazing permit appellants granted permission to said appellees to graze over certain lands leased by appellant A. T. Martin from the Territory of Alaska upon the payment of the sum of $110.00 per year. (R. 27-28.)

Appellees further allege that the principal item of property in the conditional sales agreement was 56

head of cows and that they were figured at $300.00 per head, amounting to $16,800.00 as the purchase price; that the said appellees paid over $9800.00 under the conditional sales contract, $200.00 on the lease and $110.00 on the grazing permit, and entered into possession on July 1, 1941. (R. 3-4.) That on June 28, 1941, the day of the execution of the sales contract, lease and grazing permit appellee Ross L. Sheely in writing guaranteed the performance of the conditional sales agreement and lease (R. 4, 28-29); that appellees have performed to date the terms and conditions of these several agreements and in addition to the payments previously named have paid $1541.10 on principal and $450.00 interest on the conditional sales agreement, $1000.00 under the lease, $550.00 for an equity in a truck being purchased at the time of sale by appellants from a third party, $2000.00 for hay and grain on order at that time, and have purchased additional equipment and have made improvements on the premises at a cost of $2513.00. (R. 5.) That at the time of the execution of the conditional sales agreement a large number of the cows were infected with Bang's disease which was known to appellants and unknown to appellees and that appellants sold the same to appellees with the intent to injure appellees; that since June 28, 1941 appellees have of necessity and because of said disease killed and disposed of 8 of said cows and received therefor the sum of $832.45, one-third the value of uninfected dairy cows; that the cows were purchased for a dairy herd and because of said disease were of little value for such purposes; that the plain-

tiffs and appellees have suffered damage by reason of said wrongful acts and omissions and will suffer irreparable damages if they are required to perform their agreements. (R. 5-6.) A second cause of action is set up in the complaint but as plaintiffs and appellees dismissed as to this at the time of trial, it is not considered necessary to set up the allegations. In their prayer plaintiffs and appellees pray that the conditional sales agreement, grazing permit and guaranty be rescinded, cancelled and declared void; that they have judgment for $16,163.10. (R. 8.)

To this complaint the defendants and appellants demurred upon the grounds that the same did not state facts sufficient to constitute a cause of action and upon the overruling of this demurrer filed their answer generally admitting the execution of the various instruments, denying that there was any segregation in value for the cows, denying that plaintiffs and appellees relied upon any representations of defendants and appellants, denying that plaintiffs and appellees have performed to date the requirements in said conditional sales agreement; denying that they have made improvements at a cost of $2513.00 or any sum, alleging that plaintiffs and appellees have not made any payments due under any of said instruments subsequent to December, 1941, and by reason thereof are in default, and denying that any cows were killed because of necessity or because of said disease; and generally defendants and appellants denied the other allegations of plaintiffs' and appellees' complaint alleging any misconduct on their part. (R. 30-33.)

As a first counterclaim and cross-complaint defendants and appellants alleged the execution of the conditional sales agreement referred to in plaintiffs' and appellees' complaint, further alleged that plaintiffs and appellees have defaulted for failure to make the payments due in January, 1942 and thereafter; that plaintiffs and appellees permitted other persons to have possession and control of the property and that plaintiffs and appellees contrary to the terms of the agreement have not maintained the dairy herd in an equivalent number; that there is due from plaintiffs and appellees to defendants and appellants the sum of $16,952.90 together with interest at 6% per annum from December 10, 1941 upon said conditional sales agreement. (R. 34-37.) For a second counterclaim and cross-complaint defendants and appellants alleged the execution of the lease mentioned in plaintiffs' and appellees' complaint; alleged that Ross L. Sheely guaranteed in writing the payment of the rentals named therein; alleged that the plaintiffs and appellees have refused to pay the rentals for the months January to October inclusive, 1942, and that by reason thereof there is due defendants and appellants the sum of $2000.00 together with interest at 6% per annum and that under the terms of the lease defendants and appellants elected to obtain immediate possession of said premises. (R. 37-38.) For a third counterclaim and cross-complaint defendants and appellants alleged the execution of the grazing permit mentioned in said plaintiffs' and appellees' complaint; that plaintiffs and appellees refused to make the payment of $110.00 due August 19, 1942 and are in default; and that defend-

ants and appellants were entitled to immediate possession. By way of prayer defendants and appellants prayed that plaintiffs and appellees take nothing by reason of their complaint; that defendants and appellants have judgment for the sum specified in their first and second cross-complaints and have possession of the premises mentioned in their third cross-complaint. (R. 39-40.)

At the time of the trial on December 18, 1942 plaintiffs and appellees moved the court for permission to amend their complaint by adding to the title the words "copartners" and that the other allegations of the complaint be likewise amended to show the copartnership. This was granted by the court and defendants and appellants were given time to move against such amended complaint and reply when filed. It is to be noted that no reply whatsoever had been filed at the time the court started trial of this case. The actual trial was commenced on December 19, the amended complaint and a reply were filed on December 21, after the trial had been going on for several days. The amended complaint filed by the plaintiffs and appellees contained similar allegations to those contained in the original complaint, except they alleged that on June 28, 1941 plaintiffs and appellees were copartners, and in addition contained paragraph XI alleging that plaintiffs and appellees had suffered damages in the sum of $15,000.00 by reason of the wrongful acts and omissions of defendants; and the prayer in this instance was for judgment against defendants and appellants in the sum of $15,000.00 in

addition to having the various instruments declared illegal and void. (R. 45-53.)

The reply of plaintiffs and appellees alleged the co-partnership mentioned above and as an affirmative defense set up practically the identical allegations contained in the complaint. (R. 53-59.)

On the same day the defendants and appellants moved to strike the amended complaint upon the ground that it did not conform to the order of the court permitting amendments, which motion was denied and excepted to. On the same day the defendants and appellants demurred to the amended complaint upon the ground that the same did not state facts sufficient to constitute a cause of action; which demurrer was overruled and the order was excepted to. On the same date the court by order directed that defendants' and appellants' original answer would apply to plaintiffs' and appellees' amended complaint and that the defendants and appellants likewise should have the right to plead estoppel. (R. 60-63.)

The trial of the action was commenced on December 19 as a law case with a jury but at the conclusion of the plaintiffs' and appellees' case and after the defendants and appellants had moved for the granting of a nonsuit, plaintiffs and appellees abandoned this position; the court dismissed the jury and the trial proceeded as an equity case.

ASSIGNMENT OF ERRORS.

The following assignment of errors will be relied upon:

1. The court erred in overruling the demurrer of defendants to the complaint of the plaintiffs on file herein upon the grounds that the same does not state facts sufficient to constitute a cause of action, which ruling was duly excepted to by the defendants herein and exception allowed. (R. 79.)

2. The court erred in granting the motion for leave to amend complaint by the plaintiffs to incorporate therein that plaintiffs were a partnership including plaintiff Ross L. Sheely, the granting of which order was duly excepted to and exception allowed. (R. 80.)

3. The court erred in denying defendants' motion to strike plaintiffs' amended complaint upon the ground that the same did not conform to the order of the court permitting amendment, which was duly excepted to and exception allowed. (R. 80.)

4. The court erred in overruling the demurrer to plaintiffs' amended complaint upon the grounds that the same did not state facts sufficient to constitute a cause of action, which order was duly excepted to and exception allowed. (R. 80.)

5. The court erred in denying defendants' objection to any testimony in support of plaintiffs' amended complaint, as shown by the objection to the testimony of plaintiffs' witness Earl Francis Graves, as follows:

"Q. (by Mr. Cuddy). I will ask you whether or not during the month of April, 1941, you examined the dairy herd of A. T. Martin?

Mr. Donohoe. Objected to—the first cause of action does not state facts sufficient to constitute a cause of action, and the second cause of action does not state a cause of action and they have been improperly united.

Court. Motion overruled. Exception granted.

Donohoe. That will go to all this evidence. We object to the testimony of this witness, as to the examination of the herd—it cannot vary the terms of the contract Exhibit 'A'—the conditional sales contract involved herein.

Court. Motion overruled. Exception allowed."

The witness was then permitted to testify as to the condition of the herd as to Bang's disease. (R. 80-81.)

6. The court erred in denying motion for nonsuit made by the defendants at the close of plaintiffs' case upon the grounds that the complaint does not state facts sufficient to constitute a cause of action, and upon the further grounds that there is not sufficient evidence to sustain the allegations of plaintiffs' complaint, to which ruling defendants excepted and exception was allowed. (R. 81.)

7. The court erred in dismissing the jury and considering this cause as one of an equitable nature, over the objection of the defendants, to which ruling the defendants excepted and the exception was allowed. (R. 81.)

8. The court erred in refusing to allow defendants' motion for a nonsuit at the close of the trial of this action, upon the grounds that the complaint does not state facts sufficient to constitute a cause of action and that there is not sufficient evidence to sustain the

allegations of plaintiffs' complaint, to which ruling defendants excepted and exception was allowed. (R. 81.)

9. The court erred in overruling defendants' objection to the introduction of Plaintiffs' Exhibit "C" introduced on the redirect examination of Earl Francis Graves, as follows:

"Donohoe. Object to the offer, it is too remote and not pertaining to the issues of this case.

Court. Objection overruled. Exception allowed."

The offer is received and marked Plaintiffs' Exhibit "C", being a report dated March 7, 1941.

Exhibit "C" being a record of the condition of Mr. Sheely's herd at Palmer, Alaska, was then received. (R. 81-82.)

10. The court erred in refusing to strike plaintiffs' Exhibit "C" introduced on the redirect examination of Earl Francis Graves, as follows:

"Q. (by Mr. Donohoe). Are you sure that paper is the same as you prepared it on March 7, 1941, did you write that on there yourself?

A. No, that has been put on later.

Donohoe. We move to strike.

Court. I think the writing on the side should be stricken from that exhibit.

Donohoe. We move to strike the exhibit.

Court. The writing may be taken off.

Donohoe. Exception.

Court. Exception allowed. * * *

Donohoe. In order to keep the record straight we have to show what is on that exhibit.

Court. The record may show butchered was written on in two places after the report was made. The Court ruled that they may be stricken.

Donohoe. Exception. The exhibit is not as originally prepared and will have undue influence upon the jury in the trial of this case.

Court. No objection was made at the time the exhibit was offered on account of those words being there. Exception allowed."

The exhibit was the same Exhibit "C", being a record of the condition of Mr. Sheely's herd of cows at Palmer, Alaska. (R. 82-83.)

11. The court erred in overruling defendants' objection to questions asked plaintiffs' witness Ross L. Sheely on direct examination, as follows:

"Q. (by Mr. Cuddy). I notice in Exhibits "A", "B" and "C" that your name is not on the list, not a signature to it but as a guaranty, will you explain to the jury how that situation arose?

Donohoe. Objected to as incompetent, the pleadings and exhibits speak for themselves.

Court. Objection overruled. Exception granted."

Mr. Sheely was then permitted over objection to testify that he was operating as a copartner with the other members of the family and his reasons for having a copartnership, contrary to the original agreements entered into between plaintiffs and defendants herein. (R. 83.)

12. The court erred in sustaining plaintiffs' objection to the question asked plaintiffs' witness Ross L. Sheely on cross-examination, as follows:

"Q. (by Mr. Donohoe). How much have you received from the butchered calves?

Grigsby. Objected to as immaterial.

Court. I will not go into the increase. Exception allowed.

Q. How much have you received from the sale of milk from these cows?

Grigsby. Objected to.

Court. Objection sustained. Exception granted."

The court refused to permit defendants to prove the value of the milk products sold by plaintiffs, derived from said dairy herd and also refused to permit defendants to prove the value of the calves born to said dairy cows and received by plaintiffs, and the court refused to permit defendants to prove the value of other products sold from the ranch premises and received by plaintiffs. (R. 83-84.)

13. The court erred in refusing to grant the motion of the defendants to strike the testimony of plaintiffs' witness Ross L. Sheely as to improvements made to the premises and as to what was a reasonable value for rental of the land, contrary to the amount agreed upon in the written lease, and as to the individual value of cows, and money spent by the witness Ross L. Sheely, as follows:

"Donohoe. I couldn't very well object to the questions of the Court, but if your Honor please I move to strike the answers of the witness as incompetent, irrelevant and immaterial.

Court. Motion denied.

Donohoe. I also object to the testimony of this witness as to monies spent by this witness as incompetent. This witness was not a party to this contract.

Court. Was this money paid under the contract?

A. Yes, sir.

Q. And you know it was paid under the contract?

A. Yes, sir.

Court. Motion overruled. Exception allowed.

Donohoe. He testified he paid it.

Grigsby. On whose behalf was this money paid—on your part or on the part of the copartnership?

Donohoe. Object, there is no mention of a copartnership in the agreement.

Court. You may have an exception." (R. 84-85.)

14. The court erred in overruling defendants' objection to the question asked plaintiffs' witness Charlotte Sheely on direct examination, as follows:

"Q. (by Mr. Cuddy). Covering the purchase of cattle on the Martin ranch and a lease of the property on behalf of whom were those three signatures?

Donohoe. Object as incompetent. The papers speak for themselves.

Court. She say testify. Exception allowed.

A. I signed it for the copartners, the four, Mr. Sheely, myself, Jack and Joe." (R. 84-85.)

15. The court erred in overruling defendants' objection to the question asked plaintiffs' witness John H. Sheely on direct examination, as follows:

"Q. (by Mr. Cuddy). And in whose benefit did you sign such instrument?

Donohoe. Object to the question.

Court. Objection overruled.

Q. For whose benefit did you sign that agreement?

Donohoe. Object as incompetent, the papers speak for themselves.

A. Well, I signed it on behalf of—we were planning a partnership, we were going to work it on shares." (R. 85-86.)

16. The court erred in finding:

(a) As in its first findings of fact, that on the 26th day of June, 1941, plaintiffs were copartners;

(b) As in its second findings of fact, that on said 26th day of June, 1941, plaintiffs Charlotte L. Sheely, John H. Sheely and Joe A. Sheely "on behalf of said partnership", entered into certain contracts, copies of which are attached to the amended complaint marked Exhibits "A", "B" and "C";

(c) As in its third findings of fact, "That at various times prior to January, 1942, the plaintiffs paid for permanent improvements to said dairy ranch and for durable supplies and equipment the sum of $1766.85 * * *";

(d) As in its fourth findings of fact, "That at the time said plaintiffs entered into said agreement and at the time said plaintiffs entered into possession of said premises, and for a long time prior thereto, a large number of the cows sold to the plaintiffs and described in the said conditional sales contract were diseased and infected with Bang's disease or contagious abortion, which fact was well known to the defendants and unknown to the plaintiffs; that not-

withstanding such knowledge upon the part of the defendants and without disclosing the same to the plaintiffs, the defendants sold and delivered the said premises and livestock thereon to the plaintiffs and accepted from the plaintiffs a portion of the purchase price thereof as hereinabove alleged";

(e) As in its fifth findings of fact, that 36 of said cattle "became useless for dairy purposes and plaintiffs were compelled on that account to slaughter and sell the same for beef, from which sale the plaintiffs derived the sum of $4472.20; that 6 of said cows died on account of said disease and there are 14 cows and one bull left of the original herd, on the premises".

And to each of which said findings defendants excepted and said exceptions were allowed. (R. 86-87.)

17. The court erred in forming its conclusions of law, as follows:

(a) Conclusion of Law No. I: "That the aforesaid conditional sales agreement, lease and grazing permit constituted one transaction and were illegal, against public policy and prohibited by Section 2 of Chapter 55 of the Session Laws of Alaska, 1919. (Sec. 626, Compiled Laws of Alaska, 1933.)"

(b) Conclusion of Law No. II: "That the plaintiffs are entitled to recover from the defendants the sum of $14,867.95, being moneys paid and expended as set forth in paragraph III of the Findings of Fact herein, together with interest on the various payments and expenditures from the time made, amounting in all to the sum of $16,091.89; that from this sum the

defendants are entitled to deduct in the sum of $4472.20, leaving the balance due from defendants to plaintiffs of the sum of $11,619.69, for which plaintiffs are entitled to judgment against the defendants."

(c) Conclusion of Law No. III: "That the plaintiffs are entitled to dispose of the 12 cows now on the Step-And-Half Ranch belonging to them, either by slaughtering or otherwise as may be permitted by law."

(d) Conclusion of Law No. IV: "That said conditional sales agreement, lease agreement and assignment of grazing permit should be rescinded."

(e) Conclusion of Law No. V: "That the defendants are entitled to immediate possession of the said premises constituting the Step-And-Half Ranch and the livestock and personal property thereon, except the said 12 cows belonging to plaintiffs, to the possession of the land described in the said lease agreement and to the use of the area described in said grazing permit."

To each of which conclusions of law defendants excepted and said exceptions were allowed. (R. 87-88.)

18. The court erred in rendering its decree for the plaintiffs herein. The court's error in this regard was based upon the following errors of the court occurring during the trial of the case: All of the errors herein assigned, to-wit: Assignments of Error 1 to 17 inclusive.

ARGUMENT.

For the purpose of convenience the argument can be broken down into a few general subheadings:

1. Neither the complaint nor the amended complaint stated facts sufficient to constitute a cause of action.

(a) The statute upon which plaintiffs and appellees based their complaint and amended complaint is unconstitutional.

(b) Even if constitutional it should not be construed to make this contract illegal or to prohibit the ownership or sale of cows unless they have been ordered destroyed by the inspector.

(c) That in other particulars the complaint and amended complaint are fatally defective.

2. The Court erred in rulings as to the admission or rejection of evidence.

3. The findings and decree are not supported by the evidence or justified under the pleadings.

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1. THE COMPLAINT AND AMENDED COMPLAINT FAIL TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

(a) Although not so specified in either the complaint or amended complaint plaintiffs and appellees apparently rely upon the provisions of Chapter 55, Session Laws of Alaska, 1919, as amended by Chapter 7, Session Laws of 1921 and Chapter 64, Session Laws of 1923 (Livestock Inspection Secs. 625, 632 incl., Compiled Laws of Alaska 1933), the pertinent part of which reads as follows:

"Chapter 55, Session Laws of Alaska, 1919. An Act to prohibit the importation into the Territory of Alaska, of diseased livestock, to make provision for the eradication of diseased livestock now in the Territory, and to make appropriation for carrying out the provisions of this Act, and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1: Importation of diseased livestock prohibited.

To import or to bring, into the Territory of Alaska, animals of whatsoever kind or character, diseased or infected with the diseases mentioned in Section 3 of this Act, is hereby declared to be injurious to the public health, against public policy illegal, and punishable as herein provided.

Section 2: To keep or transport diseased livestock forbidden.

To own, have in one's possession, sell, transfer, transport, drive or convey, from one section of the Territory to another, animals or livestock of whatsoever kind or character, diseased or infected with the diseases mentioned in Section 3 of this Act, is hereby declared to be injurious to the public health, against public policy, illegal, and punishable as herein provided.

Section 3: Unlawful to import animals infected with diseases named.—Permits.

It shall be unlawful to bring, into the Territory of Alaska, any horses, cattle, or swine, for work, feeding, breeding or dairy purposes, without first

having such animals examined and found free from the following contagious diseases: glanders, farcy, tuberculosis, actinomycosis, rinderpest, foot and mouth disease, contagious abortion, contagious keratitis, scabies, maladie du coit, swine plague and hog cholera, and without having obtained a permit from the Commissioner of Agriculture, the Assistant Commissioner of Agriculture assigned to the division of dairy and livestock of the state, territory or foreign country from which said livestock is shipped, or a permit from an inspector of the Department of Agriculture of the United States assigned to the division of dairy and livestock in the state, territory or foreign country from which such livestock is shipped; and no steamship or transportation company, or other common carrier, shall bring any such animals into the Territory of Alaska without first having had the same examined and found free from said diseases and having obtained the permit herein provided for.

Section 4: Penalties for violation of Statute.

For each evasion or violation of any provision of the three sections last preceding, the shipper or party responsible for the evasion or violation shall be fined not more than $500.00; the consignee knowingly receiving such diseased animals so shipped and transported in violation of said sections, shall be fined not more than $500.00; and the carrier knowingly carrying or transporting the same in violation of said sections, shall be fined not more than $500.00. Actions to enforce the provisions of this Act shall be brought and prosecuted under 'Title XV, Code of Criminal Procedure', Criminal Laws of Alaska, 1913, by the

United States District Attorneys for the Territory of Alaska.

Section 5: Domestic animals to be subject to inspection.

Horses, cattle or swine, for work, feeding, breeding or dairy purposes in the Territory of Alaska shall be subject to inspection and test for all diseases, and to quarantine and destruction where found to be infected with or suffering from any contagious disease by an Inspector of the Bureau of Animal Industry, United States Department of Agriculture, duly assigned by the Chief of the Bureau of Animal Industry to make inspection and test of animals suspected of being diseased in the Territory of Alaska.

Section 6: Inspector to determine whether to quarantine or destroy.

After inspection and test, the Inspector described in Section 5 of this Act shall determine whether the animal inspected is subject to quarantine or to destruction; if to quarantine, he shall prescribe the conditions and the length of time the animal shall be subject to quarantine. Where the Inspector determines that the animal should be destroyed, he is hereby authorized to condemn and cause said animal to be destroyed in such manner as he may determine, but the owner of such animal shall receive the proceeds of the sale of such slaughtered animal, if any.

Section 7: Appropriation.

There is hereby appropriated, out of the money now in the Treasury of the Territory, and not otherwise appropriated, the sum of $2,000.00 to

defray any expenses incurred in the enforcement of this Act, and the Governor of the Territory is hereby empowered, authorized and directed to carry out and to enforce the provisions of this Act; provided, however, that after the expenditure of the said $2,000.00, no further expense in connection with the enforcement of this Act shall be incurred or accrue against the Territory.

Section 8: Emergency.

An emergency is hereby declared to exist, and this Act shall be in force and effect from and after its passage and approval.

Approved May 5, 1919."

Amended by *Chapter 7, Session Laws of 1921,* as follows:

"To amend Sections 5, 6, 7 and 8 of Chapter 55, Alaska Session Laws, 1919, which act relates to diseased livestock; to provide for inspection of livestock and to make provision for carrying out this Act, and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska: That Sections 5, 6, 7 and 8 of Chapter 55 of Alaska Session Laws, 1919, be hereby amended to read as follows:

Section 5. Horses, cattle or swine, for work, feeding, breeding or dairy purposes in the Territory of Alaska shall be subject to inspection and test for all diseases, and to quarantine, slaughter or destruction where found to be infected with or suffering from any contagious disease by an Inspector of the Bureau of Animal Industry, United States Department of Agriculture, or by a qualified inspector duly authorized by the Governor of

Alaska to make inspection and tests of animals, in the Territory of Alaska; such inspection and test as far as it relates to animals kept for dairy purposes, by dairies that offer their products to the public generally in the Territory of Alaska and to animals kept for private dairy purposes, provided they are readily accessible, shall be made at least once every year, if possible, and all animals which are not readily accessible for inspection shall be inspected before they are brought into a community where other animals used for dairy purposes are kept, and the Governor of Alaska is hereby authorized to make arrangements with the Bureau of Animal Industry, United States Department of Agriculture, for said inspections and tests; and the Governor is hereby authorized in the event that suitable arrangements can not be made with said Bureau of Animal Industry for the employment or detail of a qualified inspector, to employ one or more competent inspectors to carry out the provisions of this Act. The inspection herein provided for shall be carried on in cooperation with said Bureau of Animal Industry and in accordance with the rules and regulations of said Bureau of Animal Industry.

Section 6. After inspection and test, the Inspector described in Section 5 of this Act shall determine whether the animal inspected is subject to quarantine, slaughter or destruction; if to quarantine he shall prescribe the conditions and the length of time the animal shall be subject to quarantine. Where the Inspector determines that the animal should be slaughtered or destroyed, he is hereby authorized to condemn and cause said animal to be slaughtered or destroyed in such manner as he may determine; in the case of dairy

cattle for which reimbursement only is allowable, such animal shall first be appraised as to its value, determined without regard to the disease of the animal, at a fair valuation by the Inspector and the owner; and where they are unable to agree as to the value of the animal to be slaughtered, the owner and inspector may select a disinterested third party to aid in the appraisement, and where they are unable to agree on the selection of such third party, the United States Marshal, or any of his deputies of the division where the inspection occurs, may designate a third disinterested party to act with the Inspector and owner to determine the value of the animal, as above stated. The amount realized from the sale of the carcass of the slaughtered animal, if any, shall be paid to the owner of such animal and the Inspector shall certify to the Secretary of the Territory the name and address of the owner, the date the animal was condemned, the appraised value of the animal, together with the net sum realized from the salvage thereof, or which could have been realized.

It is further provided, * * *.

Section 7. * * *

Section 8. * * *

Section 9. * * *

Approved April 25, 1921."

Amended by *Chapter 64, Session Laws of 1923,* as follows:

"To amend Chapter 55 of the Alaska Session Laws of 1919, entitled: 'An Act to prohibit the importation into the Territory of Alaska, of dis-

eased livestock, to make provision for the eradication of diseased livestock now in the Territory, and to make appropriation for carrying out the provisions of this Act, and declaring an emergency.'

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That section three of Chapter 55, Alaska Session Laws of 1919, be amended to read as follows:

'Section 3. It shall be unlawful to bring, into the Territory of Alaska, any horses, cattle, or swine for work, feeding, breeding, dairying, or for any other purposes, without first having such animals examined and found free from the following contagious diseases: glanders, farcy, tuberculosis, actinomycosis, rinderpest, foot and mouth disease, contagious abortion, contagious keratitis, scabies, maladie du coit, swine plague and hog cholera, and without having swine given the serum treatment for hog cholera within two weeks before shipping, unless having obtained a permit from the Commissioner of Agriculture, the Assistant Commisioner of Agriculture assigned to the division of dairy and livestock of the state, territory or foreign country from which said livestock is shipped, or a permit from an inspector of the Department of Agriculture of the United States assigned to the division of dairy and livestock in the state, territory or foreign country from which such livestock is shipped; and no steamship or transportation company, or other common carrier, shall bring any such animals into the Territory of Alaska without having first had the same exam-

ined, or treated, and found free from said diseases and having obtained the permit herein provided for.'

Approved April 30, 1923."

It is the contention of appellants that Section 2 of the Act insofar as it attempts to make illegal the having in one's possession, the selling or transferring of diseased livestock, and in this instance specifically Bang's disease or contagious abortion, is unconstitutional for the reason that the title of the Act embraces more than one subject, and in addition thereto the question of such possession, selling or transferring is not expressed in the title.

The Organic Act of Alaska provides (Sec. 474 CLA 1933), "* * * No law shall embrace more than one subject, which shall be expressed in its title." An examination of the title to this particular Act discloses that it is aimed (a) to prohibit the importation of diseased livestock, and (b) to make provision for the eradication of diseased livestock. A somewhat similar matter was before this court in the case of *Territory of Alaska v. Alaska Juneau Gold Mining Company,* 105 F. (2d) 841, and in the particular statute involved there, there were two subjects embraced in the title the same as in this instance and likewise the court here upheld a similar contention that the Act itself embraced a subject which was not embraced at all in the title. Quoting from the syllabus we find this statement:

"Where title recited that Alaskan act related to compensation for injured employees and bene-

ficiaries in event of death, and title of amendment recited merely that provisions of Compiled Laws relating to 'payment of compensation to injured workmen, etc.' were amended, amendment was invalid to the extent that it purported to require payments to the Territory for the benefit of aged residents, since subject of such provision was unrelated to the subject of compensation to be paid to injured employees or dependents and was not expressed in either title. Comp. Laws Alaska 1933, c. 2161, as amended by Laws Alaska 1935, c. 84; 48 U.S.C.A. § 76."

The court's attention is also directed to the following other cases which merely express the general rule:

The United States v. Howell, 5 Alaska 578, quoting from the syllabus:

"The title of the eight-hour law passed by the Legislature of Alaska in 1913 (Sess. Laws Alaska 1913, c. 29, p. 35) limits its application to lode mining claims. The Act of 1915 (Sess. Laws Alaska 1915, c. 6, p. 6) amending the same, extended its provisions to underground placer mining claims, but without any change or extension of the title of the amending act. Held, the amendatory act of 1915, embraces more than one subject, and, the extension to 'underground placer mines' not being expressed in its title, the act, to that extent, is void for conflict with the eighth section of the Organic Act of August 24, 1912 (37 Stat. L. 514, c. 387 (U.S. Comp. St. 1916, § 3535))."

Benedicto v. Porto Rican American Tobacco Company, 256 Fed. 422, the syllabus reads:

> "Under the Organic Law of Porto Rico, Jones Act, § 34 (U.S. Comp. St. 1918, § 3803n), inhibiting a bill containing more than one subject, which shall be clearly expressed in the title, and providing that an act embracing a subject not expressed in the title shall be void as to such part, Act Porto Rico Dec. 3, 1917, entitled 'An act to amend' Act March 11, 1915, 'entitled an act to protect Porto Rican cigars from misrepresentation,' by providing for inspection, and issuance of stamps of guaranty, is void as to Section 3, which, contrary to the title, intentionally converts what was simply an inspection law into an inspection law and a revenue law, by providing fees for guaranty stamps, which will yield large surplus revenues."

General Petroleum Company v. Hobson, 23 Fed. (2d) 349, it is stated in the syllabus:

> "St. Cal. 1921, p. 404, relates, as appears from its title, to reservation of minerals in state lands, examination and the granting of permits and leases to prospect for and take such minerals, and the provision of section 13 (p. 410) excluding the right of eminent domain to permittees to condemn right of way over private property is void, as not embraced in the title of the act, as required by Const. Cal. Art. 4, § 24."

And further in this case, the court said at page 350:

> "The defendant asserts that the proviso in section 13, supra, is inoperative because not embraced in the title of the act, as required by section 24,

> article 4 of the state constitution. The subject of legislation, as expressed in the title, is state lands, classification and report, granting permits and leasing, making rules, regulations, etc. Only one class, public property, is mentioned in the title; two classes of property, public property and private property, are treated in the body of the act. The legislature could deal with state property. The title for such purpose is all-embracing, but is silent as to private property, and the purpose to grant a right of eminent domain over private property is not embraced in the title, and, this being in derogation of private right, the right to condemn may not be extended by inference or implication, and such provision must be held inoperative."

It is apparent therefore that the instant statute is invalid for the reason that the title embraces more than one subject, namely, the importation of diseased livestock and the eradication of diseased livestock, and also for the more important reason that the title does not in any manner cover the question of possession, sale or transfer of diseased livestock.

(b) However, for the purpose of this argument, even assuming that the Act itself is valid, then we are faced with the necessity of interpreting it so as not to give an absurd result, which would be the fact if it were taken literally as worded. The general rule as given in 59 *C. J.* at page 964 is as follows:

> "In pursuance of the general object of giving effect to the intention of the Legislature the courts are not controlled by the literal meaning of the

> language of the statute but the spirit or intention of the law prevails over the letter thereof, it being generally recognized that whatever is within the spirit of the statute is within the statute although it is not within the letter thereof, while that which is within the letter although not within the spirit is not within the statute. Effect will be given the real intention even though contrary to the letter of the law. The rule of construction according to the spirit of the law is especially applicable where adherence to the letter would result in absurdity or injustice or would lead to contradictions or would defeat the plain purpose of the act or where the provision was inserted through inadvertence. In following this rule words may be modified or rejected and others substituted, or words and phrases may be transposed so the meaning of general language may be restrained by the spirit or reason of the statute and may be construed to admit implied exceptions. * * *''

This rule was adopted by the United States Supreme Court in the *United States of America v. Jacob Katz,* 46 Sup. Ct. 513, 271 U. S. 354, 70 Law. Ed. 986, in which the court says:

> ''General terms descriptive of a class of persons made subject to a criminal statute may and should be limited where the literal application of the statute would lead to extreme or absurd results and where the legislative purpose gathered from the whole act would be satisfied by a more limited interpretation.''

In examining this particular statute if it were taken literally, we would find the following absurd and con-

tradictory result. By Section 6 of the original act and by Sections 5 and 6 of the amendment of 1921 it is noted that provision is made for the inspection of livestock by an inspector in the Territory of Alaska and that this inspector is given the specific authority to determine whether or not to destroy or quarantine infected animals, in other words, it is perfectly discretionary with him; and in our own particular case the inspector who was a witness at the trial testified that he did not order the animals destroyed. (R. 102.) As a matter of fact, the inspector had not even quarantined them until some months after the sale from the Martins to the Sheelys had taken place. If then, in one part of the statute it is perfectly legal to permit the cows to be left in a herd by the inspector appointed for that purpose and for them to be milked and the milk sold if pasteurized, then the absurdity naturally follows that Section 2 of the Act prohibits one to own, have them in his possession or sell them. The only possible reasonable interpretation of Section 2 would be that the prohibition against owning, having them in one's possession or selling them would be effective if they had been condemned and ordered destroyed by the inspector. It is to be noted that the whole Act, even the penalty provisions of Section 4, are aimed at the transportation of diseased cattle or other animals, and apparently the words with reference to owning, having in one's possession, selling or transferring them were added without due consideration of the main purpose of the Act and the effect which such words would have if taken literally.

(c) It is readily apparent from an examination of the conditional sales agreement Section Sixth (R. 13) and from the testimony (R. 137) that the question of Bang's Disease was very much in the minds of the parties at the time the original contract for the sale was drawn, and that the only chance of the plaintiffs and appellees to get away from the plain wording of their agreement is to try to get under the terms of the foregoing statute. The Sixth Section of the agreement reads as follows: "Sixth: It is understood and expressly agreed that the buyers have inspected the property covered by this agreement and are familiar with the condition thereof and that the same is sold to the buyers without any warranties or representations of any kind or character whatsoever on the part of the sellers, save and except that the sellers warrant and agree that they are the lawful owners thereof and have full right, power and authority to sell and dispose of the same and that there are no existing liens or encumbrances against said property or any part or portion thereof." The appellants therefore warrant the title but in all other respects the appellees were on their notice in purchasing the property and did know the condition at the time of the purchase. The appellants throughout the trial, by way of demurrer, objections to the evidence and motions for nonsuit, continuously raised the issue that the complaint and amended complaint did not state facts sufficient to constitute a cause of action.

It is a rule of law so well settled that there is no necessity of quoting individual cases, that for the

plaintiffs and appellees to recover by way of rescission or cancellation they must on their part, even where there is fraud, offer to do equity themselves. Your attention is directed to the fact that there is no place in the complaint, amended complaint, reply or the testimony, where the plaintiffs and appellees have ever at any time offered to make any restitution to the defendants and appellants—in fact the whole history shows a studied course of conduct on their part which is just the opposite. Months after they had ceased making any payments whatsoever, even by way of rental, they were still operating the business for their own benefit, butchering the cows, particularly when the sales price of beef had increased to a large extent (R. 120) and the price of feed and the difficulty of obtaining help had grown. The conditional sales agreement was made on June 26, 1941, the complaint was verified December 27, 1941, the action was commenced on May 13, 1942, nearly a year after the conditional sales agreement was entered into, and most of the cows were killed in the very end of 1942, in September, October and November, without even consulting appellants, let alone offering to make any return of the property and cattle to them.

The plaintiffs and appellees in this case have apparently been taking the position throughout that these particular cattle that might have had Bang's Disease were practically the sole item covered by this transaction; but it takes only a cursory examination of the papers which are attached to the complaint and answer as exhibits to find that the cattle were only a

part of the transaction. They were actually purchasing a going business which had been in existence for years, a large number of items of personal property in addition to the cattle, together with a lease on an extensive tract of land, and there is not even an intimation that any of these other items were not lawful items of commerce. The court's attention is drawn to the case of *Hermanos v. Matos,* 81 Fed. (2d) p. 930, arising in Puerto Rico. In this case plaintiffs sued in the District Court of San Juan, Puerto Rico. The case involved the purchase from defendants of 122 head of dairy cattle for $18,000.00. After the purchase it was discovered that 43 of the cattle died of tuberculosis, a contagious disease, and after further tubercular test was made it was found that 29 more were affected with tuberculosis which had been contracted prior to the sale and that the plaintiffs were ready and willing to return to the defendants, and offered so to do, all the surviving cattle. This offer the defendants refused and plaintiff, after such tender, sued for the entire purchase price. The District Court held that there was a failure of consideration and that plaintiff recover the full purchase price and defendant take back the remaining sound cattle. The Supreme Court of Puerto Rico on appeal held that plaintiff's action did not rest on failure of consideration but was redhibitory in character and was subject to the forty-day rule of that territory, namely, within which period of time such an action could be maintained. The District Court had held that there could be no valid sale of diseased cattle. The Supreme Court of

Puerto Rico, 46 Puerto Rico Rep. 454, however held the sale valid of diseased cattle which plaintiff was seeking to rescind and that the action was redhibitory. The court said that the case depended upon the true construction of Section 1397 of the Puerto Rico Civil Code which reads as follows:

> "Animals and cattle suffering from contagious diseases shall not be the subject of a contract of sale. Any contract made with regard to the same shall be void."

The Supreme Court of Puerto Rico further held that this section did not make contracts for the sale of tubercular cattle void but voidable subject to the rescission at the option of the vendee, and if the vendee elected to rescind he must return to vendor the tubercular cattle and that the action was redhibitory and barred by Section 1399 of the Puerto Rico Civil Code which reads as follows:

> "Redhibitory action, based upon the vices or defects of animals must be instituted within 40 days, counted from their delivery to the vendee, unless, by reason of the customs in each locality, longer or shorter periods are established.
>
> "This action in the sale of animals may only be enforced with regard to the vices and defects of the same, determined by law or by local customs."

After decision by the Supreme Court of Puerto Rico dismissing plaintiff's redhibitory action for rescission by reason of its not having been brought within the forty-day period as provided by statute, the case was

appealed to the United States Circuit Court of Appeals, First Circuit, and was heard before Bingham and Morton, Circuit Judges, and Morris, District Judge. The court stated that the penal and other provisions of the statute form a plan for dealing with the menace to public health occasioned by diseased animals; that Section 1397 is part of this plan and should be so considered. The Circuit Court further points out the reasoning of the Supreme Court of Puerto Rico and holds that the unitary character of a herd of cattle is not applicable but individual animals only. The Circuit Court of Appeals reversed the Supreme Court of Puerto Rico and ordered the cause back to the District Court of San Juan with leave to plaintiffs to amend their complaint after the Supreme Court had dismissed the complaint. Thereafter certiorari was taken to the Supreme Court of the United States, *Matos v. Hermanos,* and that court reversed the Circuit Court of Appeals and affirmed the judgment of the Supreme Court of Puerto Rico. This opinion is set forth in 300 U. S., p. 429.

Thereafter a petition for rehearing was made to and denied by the Supreme Court of the United States April 26, 1937. 301 U. S. 712.

The Circuit Court of Appeals in its opinion, 81 Fed. (2d) 930, discusses the opinion of the Supreme Court of Puerto Rico and has this to say (p. 931):

> "The Supreme Court held that there had been a valid sale of the diseased cattle which the plaintiffs were seeking to rescind and that the action was redhibitory."

(p. 933):

"If the herd of cattle which were sold be regarded as a unit and as the thing which was sold, a different result would be reached because about fifty of the cattle were sound and were legitimate objects of sale. The thing sold was not therefore completely unlawful as an object of commerce; the good portion of it would pass to the vendee and would have to be returned by him if he elected to rescind; the action would be redhibitory in character and would be limited by the provisions of section 1399. The Supreme Court of Puerto Rico did not, however, so regard the transaction. It said: 'We have the idea that when cattle are sold, even for a dairy, the animals are sold individually. It is a distributive sale. It makes no difference that the sale was for a lump sum. With the exceptions noted in the chapter, only the cattle affected with a redhibitory vice' (the Supreme Court regarded tuberculosis as being of that character) 'under all the codes and the commentators that we have seen, may be returned. * * * *The defendant had a clear right to insist that the contract was good for the cattle that were sound.* * * * Before concluding this opinion we desire to say, and this appears possibly from our general considerations, that *the plaintiffs never had the right to the cancellation of the whole contract, but only to bring a redhibitory action for the animals that were suffering from or died of* a contagious disease.' (Italics supplied.)"

It is to be noted that Puerto Rico had a specific statute which said that such tubercular cattle could not be the subject of contract and there is no such

statute in Alaska. It is also to be noted that the plaintiffs in that case had made an actual offer to restore cattle to the defendants.

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2. THROUGHOUT THE ENTIRE TRIAL THE DEFENDANTS AND APPELLANTS REPEATEDLY WERE TRYING TO ASCERTAIN WHAT TYPE OF ACTION WAS BEING BROUGHT BY THE PLAINTIFFS AND APPELLEES BUT THEY APPARENTLY DID NOT KNOW THEMSELVES. THE AMENDED COMPLAINT AND REPLY WERE NOT FILED UNTIL THREE DAYS AFTER THE TRIAL HAD BEEN COMMENCED.

The contracts and agreements on their face show that plaintiff and appellee Ross L. Sheely was not a party to them, notwithstanding which, over the objection of the defendants and appellants, the court permitted testimony as to a copartnership by Sheely (R. 83), moneys expended by Sheely (R. 84-85) and testimony by the other members of the Sheely family as to a copartnership. (R. 84-86.)

The court refused to permit defendants and appellants to introduce any testimony relative to the value of the increase of the herd obtained by the plaintiffs and appellees through the sale of calves or the sale of milk or through calves taken to their other ranch at Palmer, Alaska. (R. 122.) In other words, the court took an entirely inconsistent position in saying that the Sheelys should account for a portion of the value of the butchered cows but not for calves or milk.

So too, contrary to the written terms of the lease, defendant and appellee Ross L. Sheely was permitted

to vary the terms thereof by testifying over objection as to what he thought a reasonable rental value of the land, barns and dwelling house might be. (R. 123-124.)

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3. IT IS THE CONTENTION OF APPELLANTS THAT FAR FROM DOING EQUITY, THE DECISION IN THIS CASE IF IT WERE PERMITTED TO STAND WOULD RESULT IN ABOUT AS INEQUITABLE A TRANSACTION AS IT IS POSSIBLE TO IMAGINE.

Appellee Ross L. Sheely had for a number of years been head of the Farm Extension Service of the University of Alaska; was the general manager of the corporation set up by the government to establish the Matanuska farm colony; had for several years operated a farm of his own at Palmer, Alaska, a short distance from Anchorage, Alaska, where he dealt with dairy cattle and sold milk through the Matanuska Cooperative Association, and particularly in view of the provisions of Section Sixth of the conditional sales agreement quoted above it is inconceivable that he would or did not enter into a transaction of this much importance without being thoroughly conversant with all of the circumstances and conditions.

He acquired a going and successful dairy business and after meeting payments only from June until December 1941 he continued to keep said business and all of the property, including cows, personal property, farm land and buildings, for almost a year thereafter without ever returning or offering to return any part thereof to the appellants or to account for any part

or portion of the profits that he derived therefrom. It is undoubtedly true that appellee Ross L. Sheely, rather than his family, was the principal one engaged in the business, notwithstanding the fact that the original contract was drawn at his request with the other members of the family because he was afraid that his obligations to the Matanuska Coop. would interfere. It is also apparent from his testimony (R. 127-128) that he finally started having trouble long after he had made the agreements with the Martins, in getting help, hay, supplies, and that war conditions generally were making it a little difficult for him to continue to operate, notwithstanding all of which it is the appellants' contention that they were unduly restricted by the court in not being permitted to show that he had made a substantial profit through the sale of milk and other products.

We are likewise frank to admit that it is difficult for us to place credence upon his testimony (R. 128-129) that he did not know whether it was possible to determine whether a herd had Bang's Disease; that it never entered his head to see whether or not the cows should or had been examined, and his final statement that "Those are things prohibited by law and it took me some time to find that out" is significant, in view of his previous experience and then being engaged in the business, and because of the fact that the conditional sales agreement was specifically rewritten to insert the clause that there was no warranty of condition and that he had examined the herd and other property.

CONCLUSION.

It appears to us that this was a simple business transaction entered into in good faith for the sale of a going business as is—where is, with full knowledge on the part of all parties concerned; that the Territorial statute did not and could not, in view of the fact that the inspector had never ordered any of these cattle destroyed, make them an article of illegal commerce so as to result in an inequitable consequence; that a purchaser would be permitted to take over the business, conduct it for a year and a half, appropriate all of the proceeds to his own use without making any accounting to the seller, and then return a wrecked business and not only not have to complete his payments but be permitted instead to recover back what he had originally paid.

It is earnestly and respectfully submitted that the maxims of equity have not been followed, that the judgment be reversed and that the true principles of equity be applied in this suit.

Dated, Anchorage, Alaska,
June 16, 1944.

THOMAS M. DONOHOE,
JOHN E. MANDERS,
Attorneys for Appellants.